SUPREME COURT, U. S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 318

ROBERT C. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

Paul Gordon

GORDON & WEINBERG,
By RICHARD E. POSELL,
1616 Beverly Boulevard,
Los Angeles, Calif. 90026,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I.	
Scope and Effect of the Jones Case	6
A. The Courts Below Committed Error in Deciding That Jones v. United States, Supra, Did Not Apply to the Case at Bench	6
B. Lagow, Supra, Must Be Overruled or Disapproved	8
C. The Conflict Between the Third and Fifth Circuits in the Application of Jones to Corporate Records Must Be Resolved	9
II.	
The Validity of the "Standing" Requirement Should Be Reassessed	10
Conclusion	13

INDEX TO APPENDICES

Appendix A. Excerpts From the Transcript App. p.	1
Appendix B. Opinion of the Ninth Circuit Court of Appeals	3
Appendix C. Constitutional and Statutory Provisions Involved	7

TABLE OF AUTHORITIES CITED

Cases	Page
Henzel v. United States, 296 F. 2d 650	7, 8, 9, 10
Jones v. United States, 362 U.S. 257	6, 7, 8, 9, 10, 13
Lagow v. United States, 159 F. 2d 245, Cert. Den., 331 U.S. 858	7, 8, 9, 10, 13
Linkletter v. Walker, 381 U.S. 618	11
Mapp v. Ohio, 367 U.S. 643	11
People v. Martin, 45 Cal. 2d 744	12, 13
Tehan v. United States, ex rel. Shott, 382 U.S. 406	11
United States v. Birrell, 242 F. Supp. 191	7
United States v. Goldberg, 330 F. 2d 30, Cert. Den. 84 S. Ct. 1630	7, 10
United States v. Guterma, 272 F. 2d 344	10
Villano v. United States, 310 F. 2d 680	7
Weeks v. United States, 232 U.S. 383	11

Rules	
Criminal Rules, Rule 41(e)	2, 5, 10
Federal Rules of Criminal Procedure, Rule 41(e)	5

Statutes

California Penal Code, Sec. 182 3

United States Code Annotated, Title 18, Sec. 1341.. 5

United States Code, Title 28, Sec. 1254(1) 2

United States Code Annotated, Title 28, Sec. 1918 (b) 5

United States Code Annotated, Title 28, Sec. 1924.. 5

United States Constitution, Fourth Amendment 2, 5, 8, 13

Textbook

24 University of Chicago, Law Review (1967), pp. 342, 365 11

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ROBERT C. HILL,

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PETITION FOR WRIT OF CERTIORARI.

Robert C. Hill, your petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment of that court entered March 27, 1967.

Opinions Below.

There was no formal opinion of the District Court. Excerpts of the transcript in that court, including the judge's statements on denying the motion to suppress are reproduced in Appendix A to this petition.

The opinion of the United States Court of Appeals affirming the ruling of the District Court is reported at 374 F. 2d 871, and is reproduced in Appendix B to this Petition.

Jurisdiction.

The judgment of the court below (Appendix B, *infra*) was entered on March 22, 1967.

A timely petition for rehearing was denied on May 31, 1967 (Appendix B, *infra,* p. 6). The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254 (1).

Questions Presented.

1. Whether, under Criminal Rule 41(e) and the Fourth Amendment to the United States Constitution, an accused has standing to assert the illegality of a search for and seizure of books and records of a defunct corporation which was wholly owned and operated by the accused, where many of the books and records were prepared by the accused but were turned over to another for processing and storage, and where the search and seizure did not occur on the premises of either the accused or of the corporation.

2. Whether, in light of the recent expressions of this court with respect to the purposes and function of the exclusionary rule, the federal requirement of "standing" to make a motion to exclude illegally obtained evidence has any Constitutional or logical validity.

Constitutional and Statutory Provisions Involved.

The Constitutional provisions, statutes and rules of court involved herein are set forth below in Appendix C.

Statement of the Case.

In early 1958, petitioner formed a corporation known as Inter-American Loan Service (IALS), to engage in loan placements [RT: 1697-1701]. Petitioner was the president, owner* and operator of IALS until March 30, 1959, when he received an order from the California Corporations Commissioner to cease and desist business as IALS [RT: 135].

*No IALS stock was ever issued.

As a result of this order, on April 17, 1959, petitioner turned over all records of IALS, along with his personal records pertaining to the operation of the company [RT: 123], to another corporation, the United Lender's Service, for further processing and storage [RT: 124-125]. Petitioner did not intend to transfer ownership of these records; he turned them over because he was told by the Corporations Commissioner, that while IALS and appellant could process no more work, someone else could do the work for appellant [RT: 134-135]. For this reason these records were turned over to Mr. Momaud Scherief who was the manager of United Lender's Service [RT: 124]. Petitioner had no interest whatsoever in United Lender's Service [RT: 124-125], but his brother Leland Hill, who was an officer of IALS, was also an officer of United Lender's Service.

Petitioner gave no authority to Mr. Momaud Scherief to disclose exhibit, transfer or convey the records so stored to any other party [RT: 126-128].

In July, 1959, Mrs. Leland Hill, the sister-in-law of petitioner went to the offices of United Lender's Service and, without the permission of anyone connected with the United Lender's Service of IALS, removed all of the records on the premises, including those of IALS and petitioner's personal records. These she took to her home in West Los Angeles [RT: 142, 143, 145, 146].

During the period of April 17, 1959, to July, 1959, petitioner was under arrest on a criminal complaint issued out of Fresno County, California, for violation of Section 182 of the California Penal Code (criminal conspiracy) [RT: 153]. During this period, the acting

Chief of Police of Selma, California, Mr. William Davis, attempted to obtain evidence against petitioner and in furtherance thereof he obtained a valid search warrant for the records of IALS and/or Mr. Robert Hill [Gov. Ex. 36; RT: 153-154]. Armed with the search warrant, Chief Davis proceeded unsuccessfully to three places specified therein. He then learned that the records he was seeking were being stored at the home of Mrs. Leland Hill. Chief Davis, along with Deputy District Attorney Michael Kershaw, of Fresno County, and a Los Angeles Detective, proceeded to Mrs. Hill's home [RT: 144].

At the hearing on the motion to suppress, Mrs. Hill testified that all of the records were turned over to Chief Davis and his companions because she was promised that she could see her husband, who was then in custody, and was further promised that bail, which was then set at $10,000.00, would be reduced [RT: 144-146]. Chief Davis, in his testimony, denied that any such promises were made. He testified that upon arriving at the home of Mrs. Hill, he identified himself and told her that he had a search warrant for the records of IALS and Mr. Robert Hill. Mrs. Hill then informed him that he would not need a search warrant for the records whereupon she unlocked the garage door at her home and allowed them to take all of the records that she had stored there [RT: 155].

Chief Davis subsequently returned the search warrant with a signed affidavit that it was not served on anyone, and that there was no evidence obtained thereby [RT: 175].

None of the files or records so obtained were ever used against petitioner in Fresno County; they were

turned over to the United States Postal Inspector who has had continuous control and custody of all the files and records to the present time.

Petitioner was subsequently indicted on 29 counts of mail fraud. Title 18 U.S.C.A., sec. 1341. A jury trial was held in the Federal District Court, Southern District of California, Central Division, before Judge Raymond E. Plummer, on January 18, 1965, and petitioner was subsequently found guilty on 26 counts. Petitioner was sentenced to two years imprisonment on each count, to run concurrently, and he was further ordered to pay all costs of prosecution as provided by Title 28 U.S.C.A. sec. 1918 (b), the amount to be taxed according to Title 28 U.S.C.A., sec. 1924.

On April 10, 1964, and again on January 18, 1965, the petitioner filed a motion to suppress evidence under Federal Rules of Criminal Procedure Rule 41(e). Said motions were denied on the ground that appellant had no standing to make such a motion because he was not a "person aggrieved" under Rule 41(e) (see Appendix A).

Books and records seized at the home of Mrs. Leland Hill were subsequently admitted into evidence and used against appellant over the continuing objection of his counsel.

On appeal to the United States Court of Appeals for the Ninth Circuit, the ruling of the court below was affirmed on March 22, 1967. The Court of Appeals assumed that the evidence was "obtained in a manner contrary to the prohibitions of the Fourth Amendment to the Constitution of the United States" (Appendix B, p. 4, lines 9-12) and ruled that petitioner had no

standing to make a motion to suppress. Appellant's Petition for Rehearing was filed on May 19, 1967, and was denied May 31, 1967.

Reasons for Granting the Writ.

This is a case where the issue of standing is squarely raised. Both courts below refused to rule on the illegality of the search and seizure, choosing rather to rest their denials of the petitioner's motion on the basis of standing. This petition for a Writ of Certiorari should be granted because this court will be given an opportunity not only to determine the scope and effect of the decision of this court in *Jones v. United States*, 362 U.S. 257 (1960), but to review and decide the fate of the steadily weakened federal requirement of "standing" to move to suppress illegally obtained evidence.

I.

Scope and Effect of the Jones Case.

A. The Courts Below Committed Error in Deciding That Jones v. United States, Supra, Did Not Apply to the Case at Bench.

Jones, in greatly liberalizing the requirements of standing, stated that the essential test of a "person aggrieved," was whether he is ". . . a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." (*Jones, supra*, at p. 261). Your petitioner asserts that here, where the purpose of the search was to obtain evidence of a crime committed by the *petitioner*, pursuant to a criminal complaint charging that *petitioner* and not the

corporation with said crime, and which ultimately was used against the *petitioner* in a criminal trial, the petitioner is the most obvious victim of the search. The search was not directed at anyone else, and certainly not at a defunct corporation.

Justice Frankfurter, in *Jones,* also indicated that the old restrictive rule of the lower federal courts requiring the accused to claim a proprietary interest in either the premises searched or the property seized was to be eased in its application, and that historical concepts of property law were not to be imported "into the law surrounding the constitutional right to be free from unreasonable searches and seizures." (*Jones, supra,* p. 266).

In the present case, the courts below placed overriding significance on the corporate ownership of the books and records, relying primarily on *Lagow v. United States,* 159 F. 2d 245 (2nd Cir.) Cert. Den., 331 U.S. 858 (1946), a pre-*Jones* case, and *United States v. Goldberg,* 330 F. 2d 30 (3rd Cir.) Cert. Den. 84 S. Ct. 1630 (1964) which also cites *Lagow* while ignoring *Jones.*

On the other hand, many recent cases have appreciated that Justice Frankfurter's attack on strict property concepts as they pertain to "standing" must, perforce, include a disapproval of strict adherence to the older requirement of individual as opposed to corporate ownership (see, for example, *Henzel v. United States,* 296 F. 2d 650 (5th Cir.) 1961; *Villano v. United States,* 310 F. 2d 680 (10th Cir. 1962); *United States v. Birrell,* 242 F. Supp. 191 (S.D.N.Y., 1965)). Under these cases and this philosophy, petitioner contends that he had sufficient interest in the

books and records to raise the illegality of the search and seizure in a motion to suppress. The undisputed facts reflect that the property seized belonged to a corporation of which petitioner was president and owner and which was defunct at the time of the search. Moreover, the books and records were in good part prepared by petitioner and were merely turned over to another for processing and storage. These are all factors which should have been considered and discussed by the lower courts; instead, they were ignored as subordinate to the fact of corporate ownership. Petitioner has thus been the victim of legal reasoning which paid no heed to modern currents, such as *Jones* and *Henzel,* but rather followed the authority of older case law which reflected outmoded philosophies. This, alone, is reason enough for this court to hear this case.

B. Lagow, Supra, Must Be Overruled or Disapproved.

As discussed above, it would appear that the *Jones* decision, and cases thereafter decided left *Lagow v. United States, supra,* with little, if any, vitality. In that case, on scantily reported facts, the Second Circuit decided that an illegal search against a corporation could not be raised by an individual associated therewith, even if he was the sole shareholder; having availed himself of the use of the corporation form, said the court, he could not be heard now to complain: "Its wrongs are not his wrongs; its immunity is not his immunity." (*Lagow, supra,* at 246).

In light of *Jones* and the view of the Fourth Amendment expressed therein, this restrictive attitude must be finally disapproved by this court. Obviously, an owner of a corporation may stand accused of a crime

perpetrated through the corporation; he has not gained any undue advantage nor immunity by availing himself of the corporate form. The crime of the corporation may well be his crime; and whether its immunity is his immunity is the very question to be decided. This court should clarify the status of *Lagow* and cases grounded thereon by declaring them to be outmoded and inconsistent with the *Jones* decision.

C. The Conflict Between the Third and Fifth Circuits in the Application of Jones to Corporate Records Must Be Resolved.

In 1961, soon after the decision of this court in *Jones*, the Fifth Circuit was asked to rule upon the standing of a sole shareholder and president of a corporation to move to suppress the use of illegally seized corporate books and records. Relying upon *Jones*, the court ruled in favor of standing and rejected the prosecution's argument, based on the *Lagow* rule, as follows:

> "Nor does it make any difference that the property seized and the premises searched in this case were owned by a corporation rather than by an individual. Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, *Silverthorne Lumber Company v. United States*, 251 U.S 385, 40 S. Ct. 182, 64 L.Ed. 319, there is nothing in the corporate status of Chemoil [the corporation] which would prevent appellant from attacking the unlawful search and seizure of the corporation's property." (*Henzel v. United States*, 296 F. 2d 650, at 652 (5th Cir. 1961)).

Yet, three years later, the Third Circuit appeared to ignore both *Jones* and *Henzel* in deciding *United States v. Goldberg,* 330 F. 2d 30 (3rd Cir.) Cert. Den. 84 S.Ct. 1630 (1964). In *Goldberg,* a president and major owner of a corporation turned over "corporate records" to some of the corporate employees, who in turn gave them voluntarily to the Internal Revenue Service. Although the court ruled that there was no illegal search and seizure, it also clearly decided in one brief paragraph that the defendant had no standing to object to the use of the evidence so obtained because it consisted of corporate owned records, citing *Lagow* and *United States v. Guterma,* 272 F. 2d 344, 346 (1959) (which relied primarily on *Lagow*), both of which were pre-*Jones* cases. No mention is made of *Henzel* or *Jones,* although those decisions were reported and clearly applicable.

Petitioner contends that the foregoing cases and jurisdictions are clearly at odds and that this court should use this opportunity to resolve that conflict. Until it does so, a most critical area of federal and constitutional law will remain muddied by inconsistent authorities.

II.

The Validity of the "Standing" Requirement Should Be Reassessed.

Even if this court chooses not to decide the applicability of *Jones* to the case at bench, petitioner requests that the implicit approval of the standing requirement in Federal criminal cases be seriously reconsidered.

Rule 41 (e), which presently forms the basis for the standing requirement, merely designates the moving

party in a motion to suppress as a "person aggrieved by an unlawful search and seizure"; it is submitted that one need not have an interest in the property seized or the premises searched in order to be "aggrieved"—one need merely be subjected to prosecution grounded on the evidence unlawfully obtained thereby.

The salient purpose of the exclusionary rule first established by this court in *Weeks v. United States,* 232 U.S. 383, and later applied to the states in *Mapp v. Ohio,* 367 U.S. 643 (1961) is one of deterrence. Never has this function been so clearly and cogently stated as by this court in its opinion in *Linkletter v. Walker,* 381 U.S. 618 (1965):

> "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since Wolf requiring the exclusion of illegal evidence has been based on the necessity for a effective deterrent to illegal police action." (*Linkletter, supra,* at pp. 636-637).

The same principle was reiterated with considerable force in *Tehan v. United States, ex rel. Shott,* 382 U.S. 406 (1966).

As legal writers are beginning to discover, the deterrence rationale is quite inconsistent with the standing restriction thus far superimposed on the right to exclude illegally obtained evidence in the federal courts. (See, *e.g., Standing to Object,* 24 Univ. Chi. L.R. 342, 365 (1967).) Indeed, California, a leader among the states in establishing the exclusionary rule, has long

ago concluded that the exclusionary and standing rules cannot co-exist. Thus, in *People v. Martin,* 45 Cal. 2d 744 (1955) the California Supreme Court was requested by the state to incorporate a "standing" rule similar to that established in the lower federal courts into the law of California. The court refused in an eloquent opinion, pertinent excerpts of which are as follows:

> "Thus, the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. (*Connolly v. Medalie supra,* 58 F. 2d 629, 630). In adopting the exclusionary rule, however, this court recognized that it would not be justified on that theory (*People v. Cahan,* 44 Cal. 2d 434, 443, 282 P. 2d 905) and based its decision on the ground that other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activity of law enforcement officers (44 Cal. 2d at 445). This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the

escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.

". . .

"[The defendant's] . . . right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of law." (*People v. Martin, supra,* pp. 759 to 761).

The reasoning of the *Martin* case has been given renewed vigor on the federal level by this court's recent emphasis of the deterrence rationale. Law enforcement officials must no longer be allowed to secure the conviction of one or more defendants by violating the constitutional rights of third persons, who may indeed be equally guilty or, as in the present case, totally innocent, but who must suffer the indignity of an illegal search because they harbor evidence which will incriminate others. Petitioner submits that the time is ripe for a reassessment, and disapproval of an archaic and undue impediment to full enforcement of the Fourth Amendment.

Conclusion.

The decision of this court in *Jones v. United States,* requires clarification, its application to the case at bench should be decided, and the error committed below rectified. In addition, the *Lagow* decision should be disapproved and the conflict in several of the circuits arising out of reliance thereon should be resolved. Finally, the restrictive federal requirement of "standing" should

be reassessed and abandoned as being inconsistent with the recent explanation by this court of the exclusionary rule. For these reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GORDON & WEINBERG,
By RICHARD E. POSELL,
Attorneys for Petitioner.

APPENDIX A.

Page 179, Lines 1-19—Reporter's Transcript:

Mrs. Dunne: Well, if I might call the Court's attention to the opposition to the motion to suppress filed prior to trial, the preliminary motion to suppress, which is identical to the one we are currently hearing. Citation of United States vs. Goldberg, Third Circuit, 330 F.2d 30, and citation to Lagow vs. United States, 159 F.2d 245.

The Court: I read both of those cases before coming into court this morning and it is my understanding, unless you can convince me otherwise, that the Ninth Circuit Court precisely so held in Bowers vs.—no, in Lagow vs. United States—the Second Circuit, excuse me—and unless you have some authorities to the contrary, these citations appear on Page 3 of the opposition of defendant's motion to suppress evidence. Corporate records are not personal records of the officers or stockholders but belong to the corporation concerned. and therefore an individual officer or shareholder has no basis on which to suppress corporate records, although the records were concededly illegally seized. And the second case, Lagow vs. United States, at least the way I read it, definitely stands for that proposition.

Page 184, Lines 21-25; Page 185, Lines 1-9—Reporter's Transcript:

The Court: I am going to accept as true the complete testimony of Chief Davis and I think that the distinction that must be made here is the fact that they were talking about corporate records. We do not have the corporation protesting, nor objecting, nor do we have the records being used against the corporation.

I feel that on the facts before the Court, the law that is applicable is that cited by the government, and which is set forth in the United States vs. Goldberg, 330 F.2d Page 30, and Lagow vs. United States, 159 F.2d 45, certiorari denied, 331 United States 858. And under all the facts and circumstances, I consider the affidavit filed by Mrs.—the defendant, Mr. Hill, on April 10, 1964, his testimony yesterday and all the testimony advanced by the defendant, and a minute order may be entered at this time denying the motion to suppress evidence.

APPENDIX B.

Opinion of the Ninth Circuit Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Robert C. Hill, *Appellant*, vs. United States of America, *Appellee*. No. 20,942.

[March 22, 1967]

Appeal from the United States District Court for the Southern District of California Central Division.

Before: Hamley and Duniway, Circuit Judges, and Copple, District Judge.

Duniway, Circuit Judge:

Convicted on 26 of 29 counts of an indictment charging mail fraud (18 U.S.C. §472), Hill appeals. He does not assert that the evidence is insufficient to sustain the conviction. He charges two errors: (1) Denial of his motion to suppress evidence, and (2), denial of due process. We affirm.

Hill organized a California corporation called Inter-American Loan Service, Inc. (I.A.L.S.) He was its president and owner. All of the business in the course of which the frauds were committed was that of the corporation. Solicitation and correspondence were in the name of the corporation; checks received were payable to the corporation; contracts were in the name of the corporation. The "business" was carried on from April, 1958. until March 30, 1959, when the California Commissioner of Corporations issued a "Desist and Refrain Order." Shortly after, Hill caused all of the files of I.A.L.S. to be turned over to a partnership called United Lenders Service and composed of four persons, two

former employees of Hill, his brother and one Scherief. Hill retained no control or supervision over the files. Later, the wife of Hill's brother removed the files to the home of herself and the brother, in Los Angeles.

In the summer of 1959, pursuant to charges filed in Fresno County, California against Hill and others, the Chief of Police of Selma, California, came to Los Angeles and obtained the files from Hill's sister-in-law. For the purpose of this decision, we assume, but do not decide, that they were obtained in a manner contrary to the prohibitions of the Fourth Amendment to the Constitution of the United States. The files were turned over to the District Attorney of Fresno County and he in turn, after disposition of the charges against Hill in that county, turned them over to a federal postal inspector. It is some of these records that were used to convict Hill in this case, and that he sought to suppress.

The trial judge denied the motion on the ground that Hill lacked standing—that he was not "a person aggrieved" within the meaning of Rule 41(e), F.R.Crim. Proc. We agree. The papers were the papers of I.A.L.S., not of Hill. The premises from which they were taken were not premises in which Hill had any interest whatever. Hill's conviction was not based on his possession of the property seized, either directly or by presumption. Thus, *Jones v. United States,* 1960, 362 U.S. 257, on which Hill relies, does not apply. See our discussion of the "standing" question in *Diaz-Rosendo v. United States,* 9 Cir., 1966, 357 F.2d 124. I.A.L.S. was the "victim of the seizure, [the] one against whom the search was directed," while Hill is "one who claims prejudice only through the use of evidence gathered as a consequence of a search directed at someone else" (*Jones, supra,* at p. 261).

The result we reach was also reached by the Second Circuit in a case directly in point. *Lagow v. United States,* 1946, 159 F.2d 245, 246, *cert. den.* 331 U.S. 858:

> "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity. This we have four times decided. *In re Dooley,* 48 F.2d 121, *United States v. De Vasto,* 52 F.2d 26, *Connolly v. Medalie,* 58 F.2d 629, *United States v. Antonelli Fireworks Co.,* 155 F.2d 631."

Compare the following cases, dealing with the Fifth Amendment privilege in relation to comparable records: *Hyster v. United States,* 9 Cir., 1964, 338 F.2d 183; *Wild v. Brewer,* 9 Cir., 1964, 329 F.2d 924; *United States v. Goldberg,* 3 Cir., 1964, 330 F.2d 30.

Henzel v. United States, 5 Cir., 1961, 296 F.2d 650, and *Villano v. United States,* 10 Cir., 1962, 310 F.2d 680, are different. In those cases, the records were seized from the personal premises of the accused. Not so here. See also *Peel v. United States,* 5 Cir., 1963, 316 F.2d 907, 909, which limits Henzel.

Hill's due process contention is based on his claim that the records were out of his possession from April, 1959 until after he was indicted in February of 1964, and that many of the records, favorable to him, had

disappeared. He does not specify any particular records as being missing, or how they would be helpful to him if available. He does not even direct his charge that records are missing to particular things that should have been in the specific files, relating to the several victims named in the 29 counts of the indictment, that were used against him. Hill was given access to all the papers that the government had, in advance of trial. We cannot predicate a holding that Hill was deprived of due process upon so flimsy a foundation.

Affirmed.

Office of the Clerk
U.S. Court of Appeals
P.O. Box 547
San Francisco 1, Calif.

May 31, 1967

Messrs. Gordon & Weinberg
Attorneys at Law
1616 West Beverly Blvd.
Los Angeles, Calif. 90026

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 20942—Robert Hill vs. USA was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a mandate of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition, Civil cases: 90 days, Criminal cases: 30 days.

Sincerely,

Wm. B. Buck,
Clerk

APPENDIX C.

I. The Fourth Amendment to the Constitution of the United States reads in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

II. Rule 41(e) of the Federal Rules of criminal procedure reads as follows:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before the trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

III. Section 182 of the California Penal Code reads as follows:

"1. To commit any crime.

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action or proceeding.

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States Justice or Judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for diffenent degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that

prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in subdivision 4 of this section, they shall be punishable by imprisonment in the state prison for not more than 10 years or by imprisonment in the county jail for not more than 1 year, or by a fine not exceeding five thousand dollars ($5,000.00) or both.

When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding Five thousand dollars ($5,000.00).

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 318

ROBERT C. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 374 F.2d 871.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1967 (R. 140).[1] A petition for rehearing was denied on May 31, 1967 (Pet. App. B 6). The petition for a writ of certiorari was filed on June

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[1] "R." refers to volume 1 of the 16-volume record. Volumes 2 through 16 are referred to herein as "Tr.".

30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a former president of a corporation, had standing to move to suppress corporate records seized at the residence of another individual.

RULE INVOLVED

Rule 41(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted under 26 counts of an indictment alleging mail fraud in connection with a scheme to collect "advance fees" from small businessmen upon false representations that his corporation could and would obtain loans for the businessmen (R. 2). He was given concurrent sentences of two years' imprisonment on each count, with eligibility for parole to be determined pursuant to 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. B; R. 140-142; 374 F.2d 871).

The government's evidence showed, in substance, that Inter-American Loan Service, Inc. (I.A.L.S.), organized and operated by petitioner as president and owner from April 1958 to March 1959, collected fees from would-be borrowers totalling some $85,000 (Tr. 1593) without securing a single loan for its clients (Tr. 693) or making a serious effort to do so (see, *e.g.*, Tr. 266, 678-684). The proof of mailings and of the fraudulent scheme was established through testimony of numerous victims (see, *e.g.*, Tr. 284-306) and employees, including salesmen recruited by petitioner to solicit clients (see Tr. 1009-1026; 1376-1409), and through the introduction of certain documents—including checks made payable to the corporation and corporate contracts, correspondence and other papers.

Prior to trial petitioner moved to suppress the corporate files and records of I.A.L.S. as evidence having been illegally seized from the Los Angeles residence of one Phyllis Hill (petitioner's sister-in-law) (R. 48; Tr. 114). At a hearing on the motion to suppress he testified that in March 1959, when I.A.L.S. ceased doing business (because of a "Desist and Refrain Order" issued by the California Commissioner of Corporations), he turned over the files of its clients to United Lenders Service, a partnership operated by his brother Leland Hill, who was also an officer of I.A.L.S., and one Scherief (Tr. 121-128, 135-136). The former Mrs. Leland (Phyllis) Hill testified that in July 1959, upon discovering that her husband had been taken into police custody in connection with Fresno, California, charges, she went

to the premises where United Lenders maintained offices. She was admitted after paying rent to the manager. She took files which she believed to belong to United Lenders to her residence. A few days thereafter she was visited by the Chief of Police of Selma, California, accompanied by a Los Angeles and a Fresno County representative. She testified that she delivered the files to them because they promised her in return that she could see her husband and that his bail would be reduced (Tr. 141-146).

Chief of Police Davis, of Selma, denied, however, that any promises or threats had been made to Mrs. Hill (Tr. 168). He testified that, in connection with the Fresno County investigation of petitioner, his brother and others, he had unsuccessfully sought I.A.L.S. records in Los Angeles pursuant to a search warrant secured in that county. Having been advised by petitioner's father of the location of the records (Tr. 169), he and two others appeared at the Leland Hill residence and informed Mrs. Hill that they had a warrant for "the records of the loan company" (Tr. 154). She replied that they did not need a search warrant, invited them in, obtained a key to a garage, which she then opened, and pointed out the records which they were to take (Tr. 151-165, 168). These records, after the disposition of charges against petitioner in Fresno County, were turned over to a federal postal inspector (see Tr. 132).[2]

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[2] Some of the records were subsequently introduced into evidence at petitioner's federal trial.

During the course of petitioner's testimony at the hearing on the motion to suppress, the district judge inquired if petitioner was claiming that some of the records in question were "personal" as opposed to corporate records. Petitioner replied that this was so only "in a sense [of] an employee," and his counsel elaborated that "[w]e are making no contention that there were any personal files, with the idea of them being his personal property. They were the corporation's working records of an employee, as president" (Tr. 139-141). At the conclusion of the hearing the district judge, after commenting that he was "going to accept as true the complete testimony of Chief Davis," denied the motion to suppress on the specific ground that petitioner lacked standing to object to the introduction into evidence of corporate records (Pet. App. A). The court of appeals affirmed on the same ground (Pet. App. B 4-5; 374 F.2d at 872).

ARGUMENT

Both courts below properly concluded that petitioner lacked standing, as a "person aggrieved by an unlawful search and seizure," within the meaning of Rule 41(e), F.R. Crim. P., to seek suppression of the corporate records.[3]

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[3] Although the court below did not pass on the issue, stating only that it "assume[d], but [did] not decide" that the files were obtained in a manner contrary to the Fourth Amendment (Pet. App. B 4), the evidence would in fact support a finding that there was no illegal search and seizure. It should be noted that the district court credited the testimony of Police Chief Davis, and not that of Mrs. Hill. Under his testi-

It has been long established that an individual doing business as a corporation may not vicariously assume and assert the corporation's rights under the Fourth Amendment. *Lagow* v. *United States*, 159 F.2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858.[4] Nothing in this Court's decision in *Jones* v. *United States*, 362 U.S. 257, or any other decision, casts doubt upon the continuing validity of this principle when applied to the facts of the instant case. In *Jones*, which involved a prosecution for possession of heroin seized in an apartment in which the defendant was present, this Court, in order to resolve the dilemma posed when possession both confers standing and convicts of a crime, held that the defendant might move to suppress without the necessity for a preliminary showing of an interest in the premises searched or the property seized. The Court held alternatively that "[e]ven were this not a prosecu-

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mony it would appear that there was in fact no search and that the seizure was consented to by the person in control of the premises. In addition, a search warrant, though not describing the premises where the files and records were ultimately found, had been obtained for the materials here seized.

[4] See also *United States* v. *White*, 322 U.S. 694, 698; *Wilson* v. *United States*, 221 U.S. 361, 376; *United States* v. *Guterma*, 272 F.2d 344, 346 (C.A. 2); *United States* v. *Goldberg*, 330 F.2d 30 (C.A. 3), certiorari denied, 377 U.S. 953; *Christianson* v. *United States*, 226 F.2d 646 (C.A. 8); *United States* v. *Culver*, 224 F. Supp. 419, 427 (D. Md.); *United States* v. *Friedman*, 166 F. Supp. 786, 789 (D.N.J.). Similarly, an individual has no Fifth Amendment privilege with respect to the production of the records of a corporation. *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361; *Hale* v. *Henkel*, 201 U.S. 43.

tion turning on illicit possession," the fact that Jones was legitimately on the premises when the search occurred gave him a "legally requisite interest" therein to give him standing. 362 U.S. at 263. While Jones represents a liberalization of requirements necessary to challenge the legality of searches and seizures, none of the underlying considerations there found pertinent, nor any of the resultant implications of that decision, is significant under the facts of the instant case.[5] The crime here is not one of possession. Petitioner admittedly had no interest whatever in the premises searched; nor was he present at the time of the search (see Pet. App. B 5). Moreover, he had no interest in the property seized, possessory or otherwise. While he testified that he maintained the corporate books and records from April 1958 to

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[5] What petitioner actually seeks here, as he candidly admits (see Pet. 10-14), is not an application of *Jones* or other precedents to the instant facts, but rather a sweeping extension of established principles which would wholly do away with any requirement of standing in search and seizure cases. Such a rule is far removed from the language and purpose of the Fourth Amendment, and would convert the personal right which that constitutional provision protects into an abstract, impersonal sort of privilege. No sound reason exists why one person should benefit because a wrong was committed by government officials against another, often wholly unrelated individual. Nor can any convincing showing be made, at least presently, that the rationale of the exclusionary rule is significantly impaired by the standing requirement. In any event, even should the Court be disposed to reconsider the viability of the standing requirement, the instant case would provide a poor vehicle for so doing, for a persuasive argument can be made here that the seizure involved was free from any illegality (see note 3, *supra*).

April 1959 (Tr. 123), he conceded that no personal files were involved (Tr. 141-142). He testified that he turned the files over to United Lenders in April 1959 for further processing (Tr. 128, 133-135). As far as he was concerned, the business was finished as of April 1959 (Tr. 124).

The *Jones* case has been interpreted as permitting a corporate officer in active charge of a corporate business to challenge a search where records were seized from the personal office of the officer. *Henzel* v. *United States*, 296 F.2d 650, 653 (C.A. 5).[6] It has also been relied upon to confer standing where seizures were made in business offices in the presence of the representative seeking to challenge the search. *Villano* v. *United States*, 310 F.2d 680 (C.A. 10); *De Forte* v. *Mancusi*, 36 U.S.L. Week 2022 (C.A. 2, June 28, 1967). Assuming *arguendo* the correctness of these decisions, they are plainly distinguishable from the factual situation here presented. In the instant case petitioner was not an active representative of the corporation; the search was not on corporate premises; and he was not present at the time. Under any accepted line of analysis, therefore, he had no standing to object to the search.[7] See *Wong Sun* v. *United States*, 371 U.S. 471, 492.

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[6] The *Henzel* case by explicit language turns upon "its own facts" and represents no conflict with the holding below. See *Peel* v. *United States*, 316 F.2d 907, 909, 910 (C.A. 5), explaining and limiting *Henzel*.

[7] *United States* v. *Garrett*, 371 F.2d 296 (C.A. 7), in which certiorari was granted *sub nom. Simmons* v. *United*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JULY 1967

States, on June 12, 1967, No. 55, 1967 Term, is, as a factual matter, wholly inapposite. No question of the continued viability of the standing requirement is raised in that case. Rather, one of the issues before the Court in *Simmons* is whether testimony given by one of the petitioners at a hearing on a motion to suppress was properly admitted into evidence at trial. Here, unlike there, no question is raised about a possible impairment of Fifth Amendment rights as a result of seeking to effectuate Fourth Amendment claims.

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